Vol 3197

No. 18,239

IN THE

United States Court of Appeals

For the Ninth Circuit

S. H. KRESS & CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review and Set Aside an Order of the National Labor Relations Board

BRIEF FOR S. H. KRESS & CO.

GEORGE O. BAHRS,
ROBERT J. SCOLNIK,
351 California Street,
San Francisco 4, California,
Attorneys for S. H. Kress & Co.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTION

This case is before the Court upon the petition of S. H. Kress & Co., a corporation (hereinafter called "Petitioner") pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 USC 151 et seq.) to review and set aside an order of the National Labor Relations Board (hereinafter called "Board") issued on July 11, 1962. The Board's Decision and Order (R 16-25)* is re-

*References are to pages of the record on appeal, as designated by counsel and renumbered in accordance with the rules of Court.

ported at 137 NLRB 126. This Court has jurisdiction of the proceeding under Section 10(f) of the Act in that Petitioner resides and transacts business in various counties in Northern California within this Judicial Circuit and the unfair labor practices found by the Board occurred in San Joaquin County, California within this Judicial Circuit.

STATEMENT OF THE CASE[1]

1. The Facts.

The gist of the case amounts to this:

Petitioner, in connection with a union organizing campaign, sought to ascertain by non-coercive interrogation of employees whether or not the Union, in fact, represented a majority of them. A majority of the employees voluntarily signed statements to the effect that they had not designated the Union to represent them. These signed statements were voluntarily submitted by Petitioner to the Board's Regional Office for the purpose of securing a dismissal of the then pending Union petition for certification.[2] It is obvi-

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[1]This case was submitted to the Board on a stipulated record. All of the material facts were agreed to by Petitioner and by counsel for the General Counsel of the Board and are set forth in a written stipulation. (R. 8-12.) Thus, this case does not involve any conflict in the evidence or any questions of fact.

[2]The Board's Statement of Procedure Sections 101.17 and 101.18 provide that a petition for certification filed by a labor organization must allege that the petition is supported by at least thirty per cent of the employees; that the Petitioner must supply evidence of such representation (usually in the form of cards authorizing the labor organization to represent the employees); that an investigation shall be conducted by the Board's Regional Office to ascer-

ous by simple arithmetic that if the Union did not represent 30% of the employees, it did not represent a majority. While a petition for certification cannot be challenged directly on the issue of majority status, except by the election itself and the results thereof, under the Board's rules and procedures a petition for election is subject to dismissal if the Union's required showing of interest (i.e., 30%) is successfully challenged. *For an employer to seek to avoid the time, effort and expense of a hearing and an election where such is unnecessary or improper cannot be regarded as unlawful where the means employed are not unlawful.*[3]

The Regional Director determined ex parte that the statements given to Petitioner by its employees were false.[4] But instead of dismissing the petition for elec-

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tain, among other things, whether there is a sufficient probability based on the evidence of representation that the employees have selected the labor organization to represent them; and that "in the absence of special factors the conduct of an election serves no purpose under the statute unless the (labor organization) has been designated by at least 30% of the employees." (The full text of the aforesaid Sections 101.17 and 101.18 is set forth in Appendix A below.)

[3]Petitioner was not entitled to litigate the question of the Union's showing of interest in a hearing before the Regional Director and, consequently, Petitioner did not attempt to do so. Rather, Petitioner sought to utilize the Board's administrative procedures in accordance with Board policy. See *Globe Iron Foundry*, 112 NLRB No. 145, 36 LRRM 1170. See also NLRB, Twenty-fifth Annual Report, p. 23; Twenty-sixth Annual Report, p. 34.

[4]This conclusion was based upon an administrative investigation, the nature and scope of which was never revealed to Petitioner. It is apparently the position of the Regional Director and the Board that such investigation is confidential and not subject to litigation. Therefore, no information on this subject is contained in the record before this Court. Petitioner filed objections with the General Counsel protesting the failure of the Regional Director to dismiss

tion, the Regional Director issued a complaint charging Petitioner herein with having committed the unfair labor practices which are the subject of this case. (R 4.)

More specifically, the agreed upon facts of the case are as follows:

(1) On August 2, 1961, Teamsters Union Local 439 (hereinafter referred to as the "Union") filed a petition for certification[5] (Board Case No. 20-RC-4706) in a unit of 60 employees in Petitioner's retail store in Stockton, California.[6]

(2) On August 9, 1961, the Union filed unfair labor practice charges (R 3) against Petitioner alleging that Petitioner had threatened and coerced its employees by interrogating them on or about August 7, 1961, concerning their Union activities. (Board Case No. 20-CA-2102.) On August 24, 1961, the aforesaid charges were withdrawn by the Union

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the Union's petition, pointing out that if the employees had in fact made false statements, the validity of the Union's showing of interest was even more questionable; and that in any event false statements in connection with a Board proceeding should not be condoned but should bar any further proceedings as an abuse of the Board's processes. (A copy of Petitioner's letter to the General Counsel is attached as Exhibit "A" to the Stipulation of Facts which was submitted to the Board. R 13.) No reply has ever been received from the General Counsel.

[5]Although the Union had at no time expressly demanded recognition as exclusive bargaining representative of Petitioner's employees (nor expressly claimed to represent a majority of Petitioner's employees), the Board has held that the mere filing of a Petition for certification raises a question concerning representation and is tantamount to a claim of representation and demand for recognition. *Florida Tile,* 130 NLRB 897, 47 LRRM 1444; *Tyree's Inc.,* 129 NLRB 1500, 47 LRRM 1229. The Board does not contend otherwise in this case.

[6]Stipulation of Facts, paragraph VI, R. 9.

and such withdrawal was approved by the Regional Director.[7]

(3) On or about September 6, 1961, the Regional Director submitted to the parties a stipulation for certification upon consent election. Petitioner agreed to such election but the Union disagreed objecting to certain proposed exclusions from the bargaining unit. Thereupon, on September 12, 1961, the Regional Director issued a notice of representation hearing scheduling the hearing for September 27, 1961.[8]

(4) On or about September 15, and September 16, 1961, Petitioner's store manager and labor relations representative interviewed 45 employees in the bargaining unit alleged to be appropriate by the Union.[9] These interviews took place after approximately 13 employees had voluntarily reported to the store manager and other supervisors that they did not believe that 30% of the employees in the store had signed cards for the union.[10] Petitioner's ultimate purpose was to determine the Union's alleged majority status in accordance with prior decisions of the Board.[11]

(5) The employees were interviewed separately on company time in a storeroom area so as not to interfere with the normal business of the store wholly

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[7]Stipulation, paragraph VII, R. 9.

[8]Stipulation, paragraph VII, R. 9.

[9]Stipulation, paragraph VIII, R. 9-10.

[10]Stipulation, paragraph IX, R. 11.

[11]*Blue Flash Express,* 109 NLRB 591; *General Shoe Corp.,* 114 NLRB 381; *Globe Iron Foundry,* 112 NLRB 1200. Stipulation, paragraph IX, R. 11.

unconnected with the manager's office.[12] The employees were told that Petitioner wished to determine whether the Union had obtained enough signatures to represent 30% of the employees in the unit; that their jobs were not endangered; that they could speak freely; that they were not required to furnish any information to Petitioner if they did not wish to do so; that they were free to leave at any time; that they were under no obligation to discuss the subject of the Union or Union organization; and that it was not Petitioner's intention to inquire into their feelings for or against the Union.[13] Each employee interviewed was handed a mimeographed form, asked to read it and told that he (or she) could sign it or not as he wished and that the matter was confidential and would not affect his job.[14] Forty of the employees signed such statements as follows: "I have not signed a card for the Union to represent me as an employee of S. H. Kress & Co."[15] During the interviews, Petitioner expressed no opinion about the Union or Union organization and none of the employees interviewed

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[12]Stipulation, paragraph VIII, R. 9-10.

[13]Stipulation, paragraph VIII, R. 9-10.

[14]Stipulation, paragraph VIII, R. 9-10.

[15]Stipulation, paragraph VIII, R. 9-11. One employee stated she had not signed a Union card but did not want to sign the mimeograph form either and consequently did not do so. Five employees said that they had signed Union cards but were not sure what they meant. One of these employees signed the mimeograph form and added the following statement: "At the time I signed the card, I was unaware of the purpose of the card." Four of these employees signed the mimeograph form adding the following statement: "I signed a card but would like to have it revoked." None of these statements were communicated to the Union.

made any protest or indicated any objection to any statements made or questions asked.[16]

(6) On September 19, 1961, Petitioner forwarded to the Regional Office the 45 signed forms with a letter pointing out that they represented over 70% of the employees in the bargaining unit and requesting an administrative investigation to determine whether or not the Union had an adequate showing of interest.[17] As previously indicated, the Regional Office considered that some of the signed statements made by these employees to Petitioner were false and thereupon unilaterally and ex parte revoked its prior approval of the Union's withdrawal of the unfair labor practice charges and issued the instant complaint against Petitioner.[18]

2. The Board's Decision.

The Board concluded that Petitioner violated Section 8(a)(1) of the Act which provides that it shall be an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7."

Section 7 of the Act provides as follows:

> "SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through repre-

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[16]Stipulation, paragraph VIII, R. 11.

[17]Stipulation, paragraph X, R. 11-12.

[18]Stipulation, paragraphs X and XI, R. 11-12. See also complaint, R. 4-6, and unfair labor practice charge, R. 3. It is clear and undisputed that the "newly discovered" evidence referred to by the Regional Director consisted of the 45 statements signed by employees which petitioner had submitted to the Regional Office.

> sentatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3)."

The Board's findings and conclusions go far beyond the stipulated facts and involve many inferences and presumptions as well as premises, assumptions, speculations and principles never previously announced.

The Board's own statement of its conclusion is as follows:

> "* * * We conclude that conduct of the type engaged in by (petitioner) herein *necessarily* tends to interfere with and restrain employees in the exercise of their Section 7 rights, and *to interfere with the election processes of the Board.*" (Emphasis added, R 23.)

The position taken by the Board appears to rest upon the following grounds:

1. That interrogation of employees by an employer is unlawful *per se* where the ultimate object is to ascertain the Union's majority status if a representation petition is pending.

2. That interrogation in such a situation constitutes coercion of employees absent any threats of reprisal or promises of benefit even though affirma-

tive, positive and express assurances are given by the employer to assure the existence of a non-coercive atmosphere.

3. That interrogation under the circumstances of the instant case constitutes interference with employees' right of privacy.

4. That interrogation which involves a Union's showing of interest in a representation case constitutes unlawful interference with the Board's administrative processes.

In addition the Board found that Petitioner had unlawfully induced four employees to revoke their Union authorizations or designations and ordered Petitioner to cease and desist from said conduct. The Board's finding and conclusion on this point is contrary to the stipulated facts and is based upon inferences which cannot be supported by the facts. (R 10-11.)

QUESTIONS PRESENTED

The following questions are presented herein for review:[19]

1. May the Board decide this case on an issue not raised or alleged in the charge or complaint particularly where the case was presented by a stipulated record in lieu of a hearing?

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[19]In view of the decision of the United States Supreme Court just issued in the case of *NLRB v. Reliance Fuel Oil*, ... U.S. ....., 52 LRRM 2046, ... LW ....., ... L. Ed. 2d ....., Petitioner concedes the jurisdiction of the Board in this case.

2. Does a preponderance of the evidence sustain the allegations of the complaint under Section 10(c) of the Act?

3. Are the Board's findings of fact supported by substantial evidence on the record considered as a whole?

4. Does non-coercive interrogation of employees to determine a Union's majority status or to challenge a Union's showing of interest *per se* violate Section 8(a)(1) of the Act?

5. Do employees have a right of privacy as ascribed to them by the Board under Section 7 of the Act?

6. Are the Board's election processes and administrative procedures so immune from challenge so that an employer's non-coercive attempt to investigate the issues raised in a Union's petition for certification constitutes an unfair labor practice within the meaning of Section 8(a)(1) of the Act?

SUMMARY OF ARGUMENT

The ultimate issues in this case are framed by the complaint. The charging allegations of the complaint ascribe illegality to Petitioner's motive, not to Petitioner's conduct. The purpose for which Petitioner interrogated its employees is alleged to be unlawful, not the manner or means by which it was carried out. The only unlawful purpose alleged is

that of undermining the Union.[20] The facts are stipulated. There is no conflict in the evidence. In the proceeding before the Board, the General Counsel had the burden of proving the allegations of the complaint. The stipulated facts do not prove that Petitioner's purpose was to undermine the Union or otherwise to interfere with, restrain or coerce its employees in joining the Union. On the contrary, the stipulated facts show that petitioner had the legitimate motive of ascertaining the Union's majority status and of obtaining the dismissal of the petition for certification by investigating and demonstrating the Union's lack of a valid and adequate showing of interest. Thus, the Board did not have in the record before it a preponderance of evidence establishing that the unfair labor practices alleged in the complaint had been committed. (Section 10(c) of the Act.)

Interrogation of employees with respect to Union membership or Union activities is not *per se* illegal. It depends upon whether such interrogation is "coercive." The stipulated facts show that there was no coercive intent or effect.

The Board's conclusion that Petitioner interfered with its employees' right of privacy is not supported by the facts, is contrary to the facts and is erroneous as a matter of law. Section 7 of the Act does not

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[20]What appears to be an additional allegation of unlawful purpose, i.e., that of interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, is merely a conclusion of law and does not, therefore, constitute an independent allegation of an ultimate fact.

establish a right of privacy. No authority is cited by the Board for the assertion of such right.

The Board's conclusion that Petitioner usurped and interfered with the Board's administrative processes is not supported by the facts, is contrary to the facts and is erroneous as a matter of law. The Act does not prohibit an employer from determining a Union's majority status or challenging its showing of interest. Section 8(a)(1) pertains to the rights of employees, not to the Board's internal rules. The Board's published rules of procedure require a valid petition for certification by a labor organization to be supported by a minimum 30% showing of interest. Under the Board's published procedures, no election will be held and the petition will be dismissed unless such requirement is met. Employers are requested by the Board's Regional Offices to supply information to enable the Regional Director to determine the validity and adequacy of the Union's showing of interest. Board decisions preclude employers from litigating the issue of the Union's showing of interest in a representation hearing and require employers to challenge a Union's showing of interest only through the administrative processes of the Board.

Finally, the Board's decision and order should be vacated and set aside as a denial of due process of law in that Petitioner was not charged with having committed the violations found by the Board.

ARGUMENT

1. THE BOARD CANNOT VALIDLY MAKE A FINDING OR ISSUE AN ORDER BASED UPON A CHARGE NOT CONTAINED IN THE COMPLAINT.

The gravamen of the complaint is that the interrogation was unlawful *because of an unlawful motive,* to-wit:

> "* * * *for the purpose of* undermining the Union and *for the purpose of* interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act." (Complaint, paragraph VI, R 5, emphasis added.)

No threats of reprisal or promises of benefits are alleged. No discriminatory discharges or refusal to bargain is alleged. Neither the manner of conducting the interrogation nor the time or place, nor any other circumstance, is alleged to be unlawful.[21]

A fair reading of the Board's decision indicates that the Board's principal concern was its internal rules with respect to its investigation of a Union's showing of interest in support of a petition for certification. What the Board plainly purports to decide in the instant case is the scope and extent, if any, to which an employer may legitimately challenge a Union's showing of interest.[22] In other words, the

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[21]No reference is made in the complaint to the interrogation alleged in the unfair labor practice charge. Cf. R 3 and R 4-6.

[22]It is Petitioner's contention, of course, that the purpose of its interrogation of employees was to ascertain the Union's alleged majority status. Under the particular circumstances of this case, Petitioner's inquiry related directly to the Petitioner's 30% figure

Board has decided an issue which was not presented to it. That decision is adverse to Petitioner. But Petitioner never had an opportunity to meet that issue.

On its face the Board's decision goes far beyond the scope of the complaint and the issues raised therein. Petitioner was not charged with interfering with employees' right of privacy.[23] Petitioner was not charged with having interfered with the Board's election processes or administrative procedures. Petitioner was not charged with unlawfully seeking to challenge the Union's showing of interest.

The purpose of the complaint is to frame the issues. It puts the respondent on notice of what issue or issues it must be prepared to meet. If the complaint is defective because ambiguous, uncertain or incomplete, a successful defense is obviously impossible. Similarly, if a Board decision goes outside the scope of the complaint, a successful defense is impossible. While petitioner is not entitled to any guaranty that its defense will be successful, it does have a right to present a defense on the merits of the issues raised. Petitioner had an obligation to offer a defense to the charges made against it and it had a right to expect that the decision would not be based upon charges

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for the reasons indicated above. But surely it is obvious that the thrust of Petitioner's effort was with respect to the Union's majority status and it is equally obvious that if the Union did not represent 30% of the employees, it could not represent a majority of them.

[23]Assuming, of course, that such right exists under Section 7 of the Act which Petitioner does not concede.

which had not been made and which therefore had not been defended.

In *NLRB v. Fletcher,* First Circuit (1962), 298 F. 2d 594, 49 LRRM 2497, the Court of Appeals held that the Board cannot make a finding on a charge not contained in the complaint. In that case an employer, after entering into a settlement agreement providing for recognition and bargaining with a Union, negotiated to an impasse and then informed the Union that it would not continue further recognition or bargaining because it doubted the Union's majority status. The General Counsel's complaint in that case charged the employer with not having bargained in good faith in violation of Section 8(a)(5) of the Act. The Board found that such violation had been committed on the ground that a *genuine* impasse had not been reached because the bargaining negotiations had not been conducted for a reasonable period of time after the signing of the settlement agreement. The Court agreed with the legal principle involved in the Board's decision but held that the questions of whether a reasonable time had elapsed or whether a genuine impasse had been reached were questions of fact which had not been put in issue by the General Counsel's complaint. (The employer's defense was limited to showing that the bargaining itself had been conducted in good faith.)[24]

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[24]The issues of genuine impasse and reasonable time certainly would appear to be inseparably related to a determination of good faith bargaining, more so than the issues under Section 8(a)(1) in the instant case.

In the instant case, Petitioner was charged with trying to undermine the Union.[25] The legality of Petitioner's challenging the Union's majority status or the Union's showing of interest was never questioned and was not put in issue by the complaint. Nevertheless, the principal basis for the Board's decision that Petitioner's interrogation was unlawful is that it usurped the Board's exclusive prerogative to investigate and determine through its own internal administrative procedures the validity and sufficiency of a union's showing of interest.[26]

The principle of law as referred to in the *Fletcher* case, supra, has been applied by the Seventh Circuit in *NLRB v. Bradley Washfountain Co.,* 192 F. 2d 144, 29 LRRM 2064; and by the Second Circuit in *Douds v. ILA,* 241 F. 2d 278, 39 LRRM 2682; by the Third Circuit in *NLRB v. Reliable Newspaper Delivery, Inc.,* 187 F. 2d 547, 27 LRRM 2432; also by the Third Circuit in *NLRB v. Kanmak Mills, Inc.,* 200 F. 2d 542, 31 LRRM 2187; and *Camden Lime Co. v. NLRB,* 254 F. 2d 814, 42 LRRM 2110; and by the Sixth Circuit in *NLRB v. Jack Smith Beverages, Inc.,* 200 F. 2d 100, 31 LRRM 2366.

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[25]Complaint, paragraph VI, R. 5. It should be noted that the complaint does not refer to undermining the Union's majority status. It was never demonstrated that the Union in fact represented a majority of employees at any time, and the complaint does not allege it.

[26]Nor was it ever alleged in the complaint or in the charge that Petitioner's employees had a "right of privacy" under Section 7 of the Act, or that Petitioner's interrogation unlawfully interfered with such right of privacy.

The principle is equally applicable in the instant case for the reasons set forth above.

Attention is also directed to Section 10(b) of the Act which provides in part as follows:

> "Any such complaint may be amended by the member, agent or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon."[27]

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2. THE EVIDENCE IS NOT SUFFICIENT TO SUSTAIN THE ALLEGATIONS OF THE COMPLAINT.

(a) Burden of proof.

The complaint does not allege that interrogation of employees concerning their Union membership or activities is unlawful *per se*. The complaint is based upon the theory of unlawful motive. As already

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[27]See *NLRB v. International Hod Carriers, et al.* (9th Cir. 1961), 287 F.2d 605 47 LRRM 2756, footnote 4. See also: Board's *Rules and Regulations*, 102.17 and 102.45. See also: Section 10(d) which provides: "Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

It is further submitted that the Board has acted beyond the scope of its own rules and regulations and procedures in the handling of the instant case and the related representation case (20-RC-4706). There is nothing in the Board's rules and regulations or statement of procedure (or the statute itself) authorizing the reopening of a closed case and issuance of complaint under the circumstances present herein. Whether the unfair labor practice charge was withdrawn by the Union voluntarily or at the suggestion of the Regional Office, no new charge was ever filed. The grounds stated by the Regional Director for reopening the case involved evidence unrelated to the facts alleged in the charge. Although the Union concededly could have filed a new charge, it did not do so. Nor did the Union request that the original charge be reinstituted or that the case be reopened.

pointed out, unlawful motive is specifically and expressly alleged in the complaint. The General Counsel bears the burden of proof to show that *the purpose* of Petitioner's questioning was to undermine the Union and to interfere, restrain and coerce employees. Has this been proved?

Petitioner contends that there is nothing in the Stipulation of Facts (which comprises all the evidence in the case) which proves by a preponderance[28] of the evidence that respondent's interrogation of employees was for *the purpose* alleged in the complaint. There are no facts in the stipulation to support such a finding and the circumstantial evidence will not support such an inference.

On the contrary, a preponderance of the direct evidence shows that Petitioner's purpose was an entirely lawful one, to wit: to determine the Union's majority status and to challenge the Union's showing of interest.[29]

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[28]It is respectfully suggested that in a case submitted to the Board on the basis of stipulated facts, as was done here, the substantial evidence rule in Section 10(e) of the Act is probably not applicable since the Board is not required to make findings of fact. The applicable test would seem to be whether the Board has reached a proper conclusion under Section 10(c) of the Act based "upon the preponderance" of the evidence before it. In any event, the evidence in the instant case is confined solely to the Stipulation of Facts; and it is submitted that said facts do not constitute sufficient evidence to sustain the Board's conclusions and finding of a violation, whether the sufficiency of the evidence is to be tested under the "preponderance" rule or the "substantial" rule.

[29]It is Petitioner's contention that no distinction can be made under the circumstances of this case between questioning the Union's majority status and questioning the Union's showing of interest. As mentioned above, if the Union did not represent 30%, it obviously did not represent a majority.

Attention is specifically directed to the following stipulated facts:

(a) The employee interviews were conducted in a *storeroom area, wholly unconnected with the manager's office,* during working hours; and the employees were not "docked" for the time spent during said interviews. (Stipulation, paragraph VIII, R 10.)

(b) Each employee was *assured* that his (or her) job was not endangered. (Stipulation, paragraph VIII, R 10.)

(c) Each employee was told that it was not Petitioner's intention to inquire into his feelings for or against the Union. (Stipulation, paragraph VIII, R 10.)

(d) Each employee was told that he was under no obligation to discuss the subject of the Union or Union organization. (Stipulation, paragraph VIII, R 10.)

(e) Each employee was told that he was not required to furnish any information to Petitioner if he did not wish to do so. (Stipulation, paragraph VIII, R 10.)

(f) Each employee was told that he was free to leave at any time. (Stipulation, paragraph VIII, R 10.)

(g) Each employee was asked to read the mimeographed form and was told that he could sign it or not, as he wished, that the matter was confidential and would not affect his job. (Stipulation, paragraph VIII, R 10.)

(h) Petitioner expressed no opinion about the Union or Union organization, and none of the employees interviewed made any protest or indicated any objections to any statements made or questions asked. (Stipulation, paragraph VIII, R 11.)

(i) The interviews took place after approximately thirteen employees voluntarily reported to the store manager and other supervisors that they did not believe that 30% of the employees of the store had signed cards for the Union. (Stipulation, paragraph IX, R 11.)

Thus, Paragraph VIII of the Stipulation, upon which the complaint is based, not only does not prove the allegations of the complaint, but it literally disproves them.[30]

That the burden of proof is on the General Counsel is not open to question. The scope of this burden has been clearly stated by the Courts of Appeals on numerous occasions.

In *NLRB v. Gottlieb & Co.,* (CA 7) 208 F. 2d 682 at 684, 33 LRRM 2180 at 2181-2, the Court stated:

"We also keep in mind that the burden is on the Board to prove affirmatively and by substantial evidence the facts which it asserts."

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[30]With respect to the allegation that Petitioner "sought to induce" employees to revoke union authorizations (for the same alleged unlawful purpose), the stipulated facts show only that 4 employees of the 45 interviewed, by their own free choice, indicated they wished to revoke the Union cards they had previously signed. (Stipulation, paragraph VIII, R 10-11.)

In *NLRB v. Winter Garden Citrus Products,* (CA 5), 260 F. 2d 913 at 916, 43 LRRM 2112 at 2114, the Court stated:

> "It is not and never has been the law that the board may recover upon failure of the respondent to make proof. *The burden is on the board throughout to prove its allegations, and this burden never shifts.* It is, of course, true that if the board offers sufficient evidence to support a finding against it, a respondent, as stated in the quotation first above, stands in danger of having such a finding made unless he refutes the evidence which supports it. But it is wholly incorrect to say or suggest that the burden of showing compliance with the act ever shifts to the respondent. The burden of showing no compliance is always on the board." (Emphasis added.)

The issue of burden of proof typically arises in a discharge case. For example, in *Packinghouse Workers v. NLRB,* (CA 8) 210 F. 2d 325 at 329, 33 LRRM 2530 at 2532-3, cert. den. 348 U.S. 822, the Court stated:

> "The fact that the employer may introduce evidence tending to show other reasons for discharge or refusal to reinstate does not mean that the employer has the burden of proof of establishing such alleged cause but the evidence is admissible and pertinent because it tends to disprove the allegations of the complaint."

However, the principle applies to all cases. In *NLRB v. Peerless Products,* (CA 7, 1959) 264 F. 2d 769 at 772, 43 LRRM 2720 at 2721, a recent case

involving interrogation which the Board found to have violated Section 8(a)(1), the Seventh Circuit stated:

> "Upon consideration of the record as a whole we have concluded that the interrogation of the employees was not intended to and did not interfere with their organizational activities, that there were no coercive threats made to them, and that the calling in of the small personal loans for repayment did not constitute a withdrawal of economic benefits by the Company in violation of Section 8(a)(1) of the Act. At best these charges were petty and trivial. *The burden was upon the Board to establish the alleged independent violation of this section of the Act and it did not sufficiently discharge this burden.*" (Emphasis added.)

(b) Evidence and Inferences.

Inferences must be based on evidence, not suspicion. *Universal Camera v. NLRB,* 340 U.S. 474, 27 LRRM 2373; *Osceola County Co-Operative Creamery Assn.,* (CA 8) (1958) 251 F. 2d 62, 64, 41 LRRM 2289; and pyramiding of inferences does not constitute evidence, *NLRB v. Miami Coca-Cola Bottling Co.,* (CA 5) (1955) 222 F. 2d 341, 344, 36 LRRM 2153.

An unlawful purpose is not lightly to be inferred. *NLRB v. McGahey,* (CA 5) (1956) 233 F. 2d 406, 38 LRRM 2142; *NLRB v. Sebastopol Apple Growers,* (CA 9) (1959) 269 F. 2d 705, 44 LRRM 2755.

The Courts have repeatedly held in cases involving alleged discrimination under Section 8(a)(3) that

"* * * the fact of discharge creates no presumption, * * *" *McGahey,* supra; *Sebastopol,* supra. As will be shown below, the same rule applies to interrogation. Interrogation creates no presumption. Nor does it furnish any inference that an unlawful motive was its cause.

Under the rules discussed in *Universal Camera,* supra, the Board is precluded from drawing an inference merely on the basis of evidence which in and of itself might justify it without taking into account contradictory evidence from which conflicting inferences could be drawn.

Furthermore, the Board is bound in the first instance by a stricter rule than the "substantial evidence" rule applied in *Universal Camera.* In terms of quantity or degree, substantial evidence is sufficient to sustain Board findings on appeal. It is a test to be applied by the reviewing Court. But the Board itself, in passing upon the allegations of a complaint issued by the General Counsel, is required by Section 10(c) of the Act to apply the stricter rule of "preponderance of the evidence."

Thus, for the reasons presented, the evidence in this record cannot support an inference of unlawful motivation.

3. CONSIDERING THE STIPULATION OF FACTS SOLELY ON THE MERITS, NO VIOLATION OF SECTION 8(a)(1) CAN BE FOUND.

(a) Interrogation of Employees Concerning Their Union Membership or Activities Is Not per se Unlawful.

The foregoing principle was adopted by the Board in *Blue Flash Express, Inc.,* 109 NLRB No. 85, 34 LRRM 1384, in 1954, and has been followed in numerous cases.[31] In addition, it is the rule which has been applied by practically all United Sstates Courts of Appeals.

As stated by the Board in *Blue Flash:*

> "In our view, the test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act. The fact that the employees gave false answers when questioned, although relevant, is not controlling. The Respondent communicated its purpose in questioning the employees—a purpose which was legitimate in nature—to the employees and assured them that no reprisal would take place. Moreover, the questioning occurred in a background free of employer hostility to union organization. These circumstances convince us that the Respondent's interrogation did not reasonably lead the employees to believe that economic reprisal might be visited upon them by Respondent." (34 LRRM at 1386.)

The facts in the *Blue Flash case* are virtually identical to those in the instant case.

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[31]So far as Petitioner is aware, the Board has not expressly reversed, abandoned or modified the *Blue Flash* rule.

> "At the time of the interrogation, the Respondent had just received a communication from the Union claiming majority status and the right to represent the Respondent's employees in collective bargaining . Golden so informed the employees. He further gave them assurance that the Respondent would not resort to economic reprisals and advised them that he wished to know whether they had signed union authorization cards in order to enable him to reply to the Union's request for collective bargaining. As found above, there is no credible evidence that the Respondent at any time made any threats or promises violative the Act, resorted to any reprisals, or exhibited any anti-union animus. Although the employees who had signed union authorization cards gave false answers to Golden's inquiries, the Respondent did nothing to afford them a reasonable basis for believing that the Respondent might resort to reprisals because of their union membership or activity." (34 LRRM at 1385.)

The fact that the Union in the instant case filed a petition for election rather than sending Petitioner a letter claiming to represent a majority of employees, is immaterial. The mere filing of a petition for certification raises a question concerning representation and constitutes a demand for recognition as well as a claim of majority status.[32]

In both cases the employer gave the employees assurance that there would be no economic reprisals. In both cases there was no evidence that the employer

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[32] *F. C. Russell,* 116 NLRB 1015, 38 LRRM 1389; *Florida Tile Industries,* 130 NLRB No. 103, 47 LRRM 1444.

had made any threats or promises violative of the Act or had exhibited any anti-union animus. In both cases the employer asked the employees if they had signed union authorization cards.[33]

If anything, the *Blue Flash* case afforded a stronger basis for finding a violation in that the employees were interviewed individually in the General Manager's office.

In both cases the employer's ultimate purpose was to determine the Union's majority status. The fact that Petitioner in the instant case had an additional, immediate objective of challenging the Union's showing of interest does not change the principle involved. In both cases the employer communicated to the employees its purpose which was legitimate in nature. In both cases the instances of interrogation occurred "in an atmosphere free of anti-union background" and were "not part of a pattern of conduct hostile to the Union."

Attention is directed to the following expressions of the Courts of Appeals. In *Container Mfg. Co. v. NLRB,* 171 F. 2d 769 at 773, 23 LRRM 2191 at 2195, the Seventh Circuit stated:

> "Mere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background and not associated as a part of the pattern or course of conduct hostile to unionism or as part of espionage upon employees cannot, standing naked and alone, support a finding of a violation of Section 8 (1)."

[33]In both cases the employees falsely stated that they had not.

In *NLRB v. Tennessee Coach Co.,* 191 F. 2d 546 at 555, 28 LRRM 2334 at 2341, the Sixth Circuit stated:

> "Before inquiries as to union membership and statements by employers or supervisory employees can be held to be unfair labor practices, they must be shown to have some relation to the coercion or restraint of the employees in their right of self-organization. None of the inquiries and statements made by the supervisory employees in this case were of such a character as to form any reasonable basis for the conclusion that they proceeded from an anti-union policy of the company and interfered with such rights of employees."

In *NLRB v. Montgomery Ward & Co.,* 192 F. 2d 160 at 163, 29 LRRM 2041 at 2043, the Second Circuit stated:

> "But inquiries made by the manager concerning what was being done in behalf of the union, and statements as to his not liking the union, to the extent that they constituted no threat or intimidation, or promise of favor or benefit in return for resistance to the union, were not unlawful. * * *"

In *NLRB v. England Bros., Inc.,* 201 F. 2d 395 at 398, (31 LRRM 2319 at 2322, the First Circuit stated:

> "Since there is no finding of an illegal anti-union attitude or background on the part of the respondent and since the trial examiner found that the conduct of vice president England was free from any taint of unfair labor practice, the Board cannot rely on an 'aroma of coercion' as evidence upon which to base its finding in this case."

In *NLRB v. Fuchs Baking Co.,* 207 F. 2d 737 at 738, 33 LRRM 2063 at 2064, the Fifth Circuit stated:

> "The employer had no anti-union background; and there was no evidence of any pattern of conduct hostile to unions. * * * There was no other evidence of threats or coercion of any kind, and no statement derogatory of the Union. Under these circumstances, mere words of interrogation addressed to a few employees are more indicative of a natural business interest than of any interference, restraint, or coercion."

In *NLRB v. Gottlieb & Co.,* 208 F. 2d 682 at 684, 33 LRRM 2180 at 2182, the Seventh Circuit reversed a Board decision which held interrogation to be unlawful, pointing out:

> "The company had no anti-union background. There was no pattern of conduct hostile to unionism. In hiring employees the company had never discriminated against union members and it had never discharged any employee for union activity. No promise of favor or benefit was made any of the tool room employees as an inducement for them to withdraw from the union."

In *NLRB v. Associated Dry Goods Corp.,* 209 F. 2d 593 at 595, 33 LRRM 2338 at 2339, the Second Circuit stated:

> "It is also to be noted that the conversations involved no argument. Wiszuk's explanations apparently met with no opposition. Unless we are to ignore the provisions of the Act above referred to, which insures to the employer the right of free speech, provided same contains no threat of reprisal or force or promise of benefit,

then it seems clear that there is no substantial evidence to support the findings of the Board."

In *NLRB v. Armco Drainage & Metal Products,* 220 F. 2d 573, 35 LRRM 2536, the Sixth Circuit stated:

"We find nothing, however, in the interrogations that justifies the conclusion that they had the purpose or effect of intimidating or coercing the employees or interfering with their rights of free organization. They consisted of no promises of benefits or threats of reprisal." (220 F. 2d at 582.)

* * * * *

"An employer's interrogation of employees must be judged in the light of the totality of the conduct of the employer. The coercive effect of the language used should be determined by the entire factual context in which it is spoken. National Labor Relations Board v. Virginia Electric & Power Co., 314 U.S. 469, 9 LRRM 405. Considering the record as a whole, we are of the opinion that the evidence does not sustain findings that respondent in its statement to its employees, coerced, restrained, or interfered with them in their right of self-organization, or that in its relations with its employees, it was guilty of an expression of any views containing a threat of reprisal or promise of benefit." (220 F. 2d at 583.)

In *NLRB v. McCatron,* 216 F. 2d 212 at 216, 35 LRRM 2012 at 2015, this Court stated:

"Interrogation regarding union activity does not in and of itself violate Section 8(a)(1). * * * We are of the opinion that in order to violate Sec-

> tion 8(a)(1) such interrogation must either contain an express or implied threat or promise, or form part of an overall pattern whose tendency is to restrain or coerce. We so held in Wayside Press v. NLRB, 1953, 206 F. 2d 862, 32 LRRM 2625."

In *NLRB v. Peerless Products, Inc.,* 264 F. 2d 769 at 772, 43 LRRM 2720 at 2721, the Seventh Circuit stated:

> "Upon consideration of the record as a whole we have concluded that the interrogation of the employees was not intended to and did not interfere with their organizational activities, that there were no coercive threats made to them * * *"

In *NLRB v. Hill & Hill Truck Line,* 266 F. 2d 883 at 886, 44 LRRM 2113 at 2115, the Fifth Circuit stated:

> "Section 8(a)(1) does not make all interrogation illegal. It makes it illegal 'to interfere with, restrain, or coerce employees in the exercise' of the right to organize. To be illegal, then, interrogation must amount to interference, restraint, or coercion. As far as is revealed by this record, neither the words used nor the manner or immediate situation in which they were used by Box and Hendrix took this interrogation out of the category of innocuous inquiry and put it into the category of interference, restraint, or coercion."

In *NLRB v. Southern California Associated Newspapers,* (1962) 299 F. 2d 677, 49 LRRM 2453, the Ninth Circuit held that interrogation as to union membership is not unlawful *even though such inter-*

rogation directly resulted in the discharge of the employee which was found to be an unfair labor practice. In that case the employer questioned a mail-room clerk and found out that he had joined a union. The employee was thereby discharged and, despite the employer's defense of economic motivation, the Board found that the purpose was discrimination to discourage union membership. The Court upheld the finding of unlawful discrimination but reversed the finding of unlawful interrogation, stating:

> "We find nothing in the record to support this action. The conversation was not shown to have been threatening or to have been conducted otherwise than in a friendly manner wholly consistent with the established relationship between Collins and Clark. The mere fact that an unfair labor practice followed as a result of information gained from this conversation does not, standing alone, constitute the conversation itself an independent unfair labor practice." (299 F. 2d at 679-680.)

The foregoing decisions clearly establish that interrogation of employees as to their union membership and activities is not unlawful, *unless*

(a) There is actual restraint or coercion;

(b) There are threats of reprisal or promise of benefits;

(c) There is interference with union organization or union activity;

(d) There is an overall totality or pattern of illegal conduct;

(e) There is a background of anti-union activity.

Nothing in the instant case falls within any of the above categories.[34]

Looking at the Board's own decisions, it is apparent that despite the "totality of conduct" test, interrogation as to union membership and activities has been held lawful in contexts replete with anti-union animus, threats of reprisal, promises of benefits, or discriminatory discharges. See *Newton Company,* 112 NLRB 465, 36 LRRM 1054; *Lanthier Machine Works,* 116 NLRB No. 1029, 38 LRRM 1401; *Commercial Controls Corp.,* 118 NLRB No. 1344, 40 LRRM 1369; *Rockwell Mfg. Co.,* 121 NLRB No. 47, 42 LRRM 1340; *General Electric Co.,* 119 NLRB No. 219, 41 LRRM 1383.

As already pointed out, polling of employees or distributing questionnaires or securing affidavits with regard to employees' union membership is not unlawful. *NLRB v. California Compress Co.,* (CA 9) (1959) 274 F. 2d 104, 45 LRRM 2418; *Shields Engineering,* 85 NLRB 168, 24 LRRM 1371; *Joy Silk Mills v. NLRB,* (CA-DC) 185 F. 2d 732, 27 LRRM 2012; *NLRB v. Katz Drug,* (CA 8) 207 F. 2d 168, 32 LRRM 2680; *NLRB v. Protein Blenders, Inc.* (CA 8) 215 F. 2d 749, 34 LRRM 2768; *NLRB v. Roberts*

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[34]The "per se" approach was condemned by the United States Supreme Court in *Local 357 Teamsters v. NLRB,* 365 U.S. 667, 47 LRRM 2906, setting aside the exclusive hiring hall standards formulated by the Board in the *Mountain Pacific* case, 119 NLRB 883, 41 LRRM 1460. Moreover, as pointed out by Board member Brown in discussing the trend of Board policy, the "per se" approach is being abandoned in numerous other types of situations in favor of an "independent analysis" of the merits of each case. 49 LRRM 364, ff.

Bros., (CA 9) 225 F. 2d 58, 36 LRRM 2424; *NLRB v. Gottlieb & Co.,* supra; *NLRB v. Russell Kingston,* (CA 6) 172 F. 2d 771, 23 LRRM 2387.

In *Katz Drug,* supra, the employer solicited affidavits from employees stating that they were not union members and that they had not signed authorization cards for the union. The Court held that this was not unlawful where the purpose was preparation for state court action for an injunction against picketing. The significant point, noted by the Court, is that there was no showing of any intention to interfere with the rights of employees under Section 7 of the Act.

In other situations, although not identical to the instant case, the Board and the Courts have found interrogation of employees about union activities lawful.[35] For example, it has been held that an employer may include in an employment application form a question which would elicit information as to an employee's union membership. *NLRB v. Ozark Dam Constructors,* (CA 8) (1951) 190 F. 2d 222, 28 LRRM 2246. See also *NLRB v. Sebastopol,* supra; where this Court held that such interrogation is not

[35]Where the questioning was invited by the employees or where the information was volunteered by the employees: *Scott & Williams, Inc.,* 99 NLRB 919, 30 LRRM 1149; *Anchor Coupling Co.,* 105 NLRB 958, 32 LRRM 1377; *Cruse Motors, Inc.,* 105 NLRB 242, 32 LRRM 1285; *Newton Co.,* 112 NLRB 465, 36 LRRM 1054, aff'd (CA 5) 236 F. 2d 438, 38 LRRM 2635. Where the interrogation was initiated by the employees: *NLRB v. Mississippi Products,* 32 LRRM 1033, enf. den'd (CA 5) 213 F. 2d 670, 34 LRRM 2341; *NLRB v. Protein Blenders, Inc.,* supra; *Commercial Controls,* supra; *Newton Co.,* supra; *Anchor Coupling,* supra; *Scott & Williams,* supra.

unlawful unless it contains an express or implied threat or promises or *actually* interferes, restrains, or coerces employees.

In *NLRB v. Superior Co.,* 199 F. 2d 39, 30 LRRM 2632, the Court of Appeals for the Fifth Circuit upheld an employer's right to require employees to take an unequivocal position regarding the union. In that case a group of employees who were on a union committee signed an anti-union petition. The Court stated that this:

> "* * * created a situation which the respondent was justified in inquiring into. The interrogation resolved their inconsistent position. The evidence does not disclose any threat or attempt at coercion. The incident was not part of any general pattern of interrogating employees generally about union affiliation and activities. In our opinion, such limited interrogation, justified by the acts of the employees themselves, was not a violation of the Act." (199 F. 2d at 44.)

In that case the employer's general manager summoned the employees involved to his office, called their attention to the "seeming inconsistency" and asked each of them "what side of the fence they were on." Each of the employees thereupon withdrew his or her signature from the anti-union petition. Although the Board found this unlawful, the Court did not.

The facts in the instant case plainly show that the course of interrogation embarked upon by Petitioner was the direct result of communications volunteered

by the employees themselves. In view of the Union's petition and the employees' reports, Petitioner wished to ascertain the facts. There is nothing in the Act, or any rule or decided case, that says that Petitioner was not entitled to do so. The proper test is the lawfulness or unlawfulness of the employer's motive or intent. The cases show that an employer may lawfully seek to challenge a union's purported majority status,[36] and may lawfully seek to challenge a union's showing of interest.[37]

(b) Neither the Circumstances Nor the Purpose of Petitioner's Interrogation Establishes Any Violation of the Rights of Employees.

As already demonstrated, the stipulated facts do not establish that the purpose of Petitioner's interrogation was to undermine the union. No other unlawful purpose has been alleged. No purpose of interfering with the rights of employees has been shown.

NLRB v. California Compress Co., supra, a recent decision by this Court, is virtually on all fours with the instant case so far as the applicable rule of law is concerned, although it was decided, on its own facts, adverse to the employer there involved.

In that case the Court plainly indicated that an employer may take a poll of its employees to ascertain their attitude toward unionization, expressly pointing out that it is not unlawful for an employer to procure affidavits from employees to ascertain the

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[36] *Blue Flash,* supra; and other cases cited.

[37] E.g., *Globe Iron,* supra; *California Compress Co.,* supra.

genuineness of their signatures on union cards where the purpose is to check the authenticity of the union's showing of interest in support of a petition for election. Based upon evidence of threats of reprisal against employees who signed up with the union, the court held that the purpose of the interrogation in that particular case was to undermine the union and not to challenge the validity of the union's showing of interest. The testimony showed that:

> "* * * when the affidavit was being circulated for signature by Respondent's Plant Superintendent one employee asked him 'Well, if I don't sign this list will it cost me my job?' to which the Superintendent replied 'Well, what I want to know is the men that signed this union card' and remarked 'If I knew who they were, I would fire every one of them.' " (274 F. 2d at 106.)

No such evidence exists in the instant case. Therefore, no such finding can be made. But the same principle applies and should be followed. Since the evidence shows that *Respondent's interrogation was for the lawful purpose described and approved by this Court in the cited case,* the complaint herein should be dismissed.

Therefore, even considering the evidence independently of the allegations of the complaint, Petitioner cannot be found to have violated the Act.

Another pertinent decision of this Court involving polling of employees by an employer is *NLRB v. Roberts Bros.,* 225 F. 2d 58, 36 LRRM 2424. In that

case,[38] the Board had found that the employer "by conducting a private poll of its employees to determine their union sentiment, *under the circumstances set forth above,* violated Section 8(a)(1) of the Act, thereby interfering with, restraining and coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act." (Emphasis by the Court.) This Court rejected the Board's finding and conclusion.

The circumstances again involved a union's organizing campaign and employer interrogation through a secret ballot of employees. The Union had not filed a petition for certification with the Board but had advised the company by letter of its claim to represent a majority of employees in one of the employer's retail department stores. A few days later, the employer made a privileged anti-union speech to the employees.[39] Immediately after the end of the speech the employer distributed to the assembled employees slips of paper upon which the words "against" and "for" were typed. As stated by this Court:

> "The employees were told that the company was making a survey for the information of the company and that their preference was sought through a secret ballot, and they were requested

[38]Also decided on a stipulated record, as was the instant case.

[39]Although the employer expressed his opposition to the union, both the Board and this Court considered it within the privilege granted by Section 8 (c) of the Act in that it contained no threat of reprisal or promise of benefit. It may be observed, however, that in the instant case, petitioner did not even express any opposition to the union or to union organization.

to encircle either the word 'Against' or 'For'." (225 F. 2d at 59.)

It is obvious that the purpose of the poll was to determine the employees' attitude toward the Union. The Court then noted that the Board had not purported to decide the case on a *per se* approach. In commenting upon the *per se* theory, this Court stated:

> "The per se idea announced early by the Board's *Standard-Coosa-Thatcher Co.* 1949, 85 NLRB 1358, 24 LRRM 1575, case, was later laid at rest by the Board in *Blue Flash Express Inc.,* 1954, 109 NLRB 591, 34 LRRM 1384, by a direct overruling of *Thatcher* and a direct repudiation of the doctrine that interrogation per se is unlawful."[40] (225 F. 2d at 60.)

With the *per se* idea out of the way, this Court next considered what specific circumstances, either separately or in combination, acted to violate the Act. Rejecting the Board's argument about the "subtle psychological effect on the employees", this Court found no basis upon which coercion could be inferred, concluding as follows:

> "Some twenty years ago when the war over the unionization of industry was at the critical stage, employees might well and with good reason have feared to reveal their union sentiment and might well have been swayed one way or another by an employer statement as to his position on the

[40]Significantly, this Court (and presumably, also, the Board) regarded the polling of employees by an employer through a secret ballot as a *form of interrogation.* While this is undoubtedly true, it is submitted that private poll taking is a more extreme form of interrogation and certainly more likely to make an impression upon employees than other forms of interrogation.

> subject. Now, labor and industry speak with equal dignity and it requires something more than mere suspicion to read coercion into an employer's speech which, upon its face, is in all respects within the proprieties. We think it is no longer proper to assume that the American employee is a graven individual afraid to stand up and express himself freely on the subject of his own welfare." (225 F. 2d at 60.)

It is respectfully submitted that the foregoing comments are equally applicable to the instant case.

A case very much in point and involving a closely analogous factual situation is *NLRB v. Crystal Laundry,* Sixth Circuit, 308 F. 2d 626, 51 LRRM 2197 (October 2, 1962). In that case, an employer upon learning of a union organizing compaign conducted a series of four secret polls of its employees to determine their attitude with respect to representation by a union. At the same time the employer openly and extensively expressed its opposition to the union.

The form of the ballot was as follows:

> "What Do You think TODAY
>
> "I have signed a union card—I'm in favor of it. ☐
>
> "I have signed a union card—but wish I hadn't. ☐
>
> "I haven't signed a card—but I might be interested. ☐
>
> "I haven't signed a card—and don't want to sign one. ☐"
>
> (308 F. 2d at 627.)

Based upon the foregoing facts, the Board found that the employer had interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act. The Court of Appeals reversed and dismissed the complaint stating:

> "The Act does not prohibit the taking of polls by an employer * * *" (308 F. 2d at 627.)
>
> * * *
>
> "There was no evidence in this record of any coercion exercised by the employer over its employees or any interference in the exercise of their rights * * * There were no discharges or other reprisals following the election which the Union won." (308 F. 2d at 628.)
>
> * * *
>
> "We do not regard the taking of the secret polls in this case as being a per se violation of the Act nor do we believe that the opposition of the employer to the particular Union tainted the polling. Both employer and the Union had the right of free speech unless they coerced the employees or interfered with their legitimate activities no unfair labor practice was committed." (308 F. 2d at 628.)
>
> * * *
>
> "We are of the opinion from our consideration of the record as a whole that there was no coercion of or interference with the employees in the exercise of their rights and that the Board's order is not supported by substantial evidence." (308 F. 2d at 628.)

Significantly, the Court rejected the Board's *per se* approach. In comparison, the *Crystal Laundry* case

involves a more extreme factual situation than the instant case and one in which the Board's view does not seem altogether unreasonable. For example, in *Crystal Laundry* the employer accompanied the polling of its employees with a vigorous expression of its opposition to the Union. This did not happen in the instant case where Petitioner refrained from any comment about the Union or any discussion about union organization. In *Crystal Laundry,* the employer's interrogation was not limited to one single instance or involved successive, repeated poll taking despite the fact that on each occasion the results were unanimously or overwhelmingly against the Union. In the instant case, the interrogation was limited to a single incident; there was no repetition. In *Crystal Laundry,* the Board found that the employer commenced its conduct of polling employees prior to any demand by the Union for recognition thereby concluding that there could not have been a genuine purpose of ascertaining whether the Union represented a majority of employees. In the instant case, the interrogation occurred after the Union had filed a petition for certification. In the *Crystal Laundry* case, the company acted solely on its own initiative; in the instant case, the interrogation occurred as a result of voluntary reports by a substantial number of employees that they had not designated the Union to represent them and did not believe that the Union had been designated by 30% of all the employees. In *Crystal Laundry,* the Board found that the company "had expressed its hostility to union organization and

failed at any time to state that union adherence would not subject union employees to reprisals." Exactly the opposite is true in the instant case where the stipulated facts show no hostility by Petitioner to the Union, but on the contrary, express and affirmative assurances of no reprisals. Finally, in the instant case, the interrogation was limited to ascertaining a question of fact, i.e., whether or not the employees had already signed a union authorization card. No attempt was made to probe into the employees attitudes or sympathies toward the Union. The employees were not questioned concerning their opinions about the Union. Exactly the opposite was true in the *Crystal Laundry* case where the ballots on their face sought to elicit information as to whether the employees "might be interested" in the Union or whether the employees wished they had or had not signed union cards. As the Board observed such inquiry hardly reflected an effort limited to determining the Union's present majority or minority status.

Nevertheless, in the *Crystal Laundry* case, the Court on the same facts as were before the Board rejected the Board's finding of a violation of Section 8(a)(1). *A fortiori* the Board's finding of a violation in the instant case cannot be sustained.

Another recent case supporting Petitioner's position herein is *Bon-R Reproductions v. NLRB,* Second Circuit, 309 F. 2d 898, 51 LRRM 2413 (November 5, 1962). In that case a union conducted an organizing

drive in the employer's plant and notified the employer that it represented a majority of the employees and requested recognition as bargaining representative. The president of the company proceeded to call to his office each of the employees in turn and questioned them about their attitude toward the union. The interviews followed a standard pattern. Each lasted for just a few minutes. The company bookkeeper (a stockholder in the company) and the foreman were also present. No threats of reprisal or promises of benefits were made. No expression of employer hostility to the union was demonstrated except for the statement by the company president to one of the employees that in effect the employees could not have a union unless the company agreed.[41] Such statement was repeated twice to employees on the following day.

The purpose of the interviews was purportedly to ascertain whether a majority of the employees were in favor of the union. However, when the company president phoned the union to report that a majority of the employees did not want to be represented by the union, the union's offer to resolve the issue by a secret ballot was summarily rejected. The next day the company president again called all the employees together and continued to discuss the union and interrogate them as to their position. In addition, all employees were told that no union would come in unless he wanted it to, or words to that effect. A few

[41]The Court sustained the Board's finding that this particular remark was coereive, and the Court affirmed the Board's order requiring the employer to cease and desist from such conduct.

minutes after this meeting one of the employees was discharged.[42]

The Board found that the employer had coercively interrogated employees, concluding as follows:

> "Not only does the record show employer threats during the course of the interrogations, but it also appears that Spielman, respondent's president, interrogated some employees about the possible union activities of the others, and that he persisted in demanding that the employees indicate how they felt about the Union and whether they would like a Bay union in the plant, and this after each had stated he knew nothing about the Union's telegraphic request for recognition. Moreover, the timing of the interrogations and the fact that the coffee break meeting sought the same information previously obtained, convinces us that the Respondent conducted these polls for the purpose of interfering with its employees' union and concerted activities * * *" (134 NLRB No. 38, 49 LRRM 1203.)

The Court rejected the Board's analysis, stating:

> "We do not agree with this statement of the Board * * * The only evidence anywhere in the record of 'employer threats' is the single ambiguous statement made to Ford, who did not understand it to be a threat. The Board disregards entirely the unanimous recollection of the employees, all of whom testified that no threats were made. Nor can we find anything coercive in the general questions which Spielman put to his em-

[42]A divided court rejected the Board's finding that this employee had been discharged for his union activities.

> ployees * * * The circumstances are exactly those in which the Board has held that non-coercive interrogations are permissible * * * (309 F. 2d at 904.)
>
> "We find, therefore * * * that the interviews of August 22, taken by themselves, come within the protection of the so-called Blue Flash doctrine, which permits questioning of employees 'under proper safeguards.' * * * Every one of the criteria announced in that case has been met: The employer had reason to conduct the interviews, he advised his employees of his reason, he made no threats or promises of benefit. The interviews were short and openly conducted in a background free of hostility toward unions." (309 F. 2d at 904.)

The Court further held that there was nothing in the events which followed the interviews to justify a finding of coercive interrogation, i.e., the employer's refusal to agree to the union's request for a secret ballot, and the employer's statements in the group meeting.

The Second Circuit cited its previous decision in *NLRB v. Firedoor Corp.,* 291 F. 2d 328, 48 LRRM 2408 (cert. den., 368 U.S. 921, 1961). In the *Firedoor* case, a union petitioned the Board for an election and shortly thereafter the employer asked seven or eight of the thirteen employees involved whether they were members of the union. Following their denial, the employer asked them to sign a petition addressed to the Board in effect disclaiming any authorization to the union to represent them. All but one refused to

sign. Thereafter the employer discharged two of the employees who were interrogated because of their union membership and made unlawful threats and promises to other employees.

Nevertheless, the Court held that the "interrogation of the employees was not a nunfair labor practtice." The Court explained its reasoning as follows:

> "Interrogation of employees is legal, when the questioning is not accompanied by any explicit threats, cf. N.L.R.B. v. Beaver Meadow Creamery, 215 F.2d 247, 32 LRRM 1007 (3 Cir. 1954), if under all the circumstances coercion is not implicit in the questioning. Matter of Blue Flash Express, Inc., 109 N.L.R.B. 59, 34 LRRM 1384 (1954); N.L.R.B. v. Armco Drainage & Metal Prod., 220 F.2d 573, 582, 35 LRRM 2536 (6 Cir. 1955), cert. denied, 350 U.S. 838, 36 LRRM 2716; N.L.R.B. v. Assoc. Dry Goods Corp., 209 F.2d 593, 33 LRRM 2338 (2 Cir. 1954); N.L.R.B. v. Syracuse Color Press, 209 F.2d 596, 33 LRRM 2334 (2 Cir. 1954). [Footnote omitted] The most relevant factors are whether there has been a background of employer hostility to and discrimination against the union [footnote omitted] and whether the questions seem to seek information which the employer in good faith needs—as when individuals are asked whether they belong to the union so that the employer can check the union's claim to represent a majority [footnote omitted] or, to the contrary, seem to seek information most useful for discrimination—as when employees are asked who organized the union or whether named fellow workers belong. [Footnote omitted] Other relevant factors are whether the identity of the

questioner and the place or method of interrogation imbue the interview with an unnatural formality which tends to intimidate the employee and, to a lesser extent, whether the employees did conceal their allegiance or denied membership when they actually had not made up their mind and, therefore, became unwilling to take an active part in later organizational activity or even, in the case of a small unit, afraid to vote their true convictions at a later Board-conducted election. See Syracuse Color Press, supra; Blue Flash Express, Inc., supra [dissenting opinion].

The interrogation of the employees was not improper under these standards. There was no past history of anti-union discrimination; Mirsky had reason to check the union's claim of majority status for the claim came as a 'complete surprise' to him; [footnote omitted] the questioning was limited to whether the questioned employee belonged to the union; Mirsky worked closely with the men and questioned them in a casual manner. Though the men all denied membership they were not thereby cowed into avoiding any pro-union stands for the very next day all but one refused to sign an anti-union petition. . . ." (291 F. 2d at 331-332.)

Measured up against the *Bon-R* and *Firedoor* cases, and the other cases cited and discussed above, it is clear that Petitioner's interrogation in the instant case cannot be held to constitute interference, restraint or coercion of the rights of employees in violation of the Act.

4. INTERROGATION FOR THE PURPOSE OF CHECKING THE AUTHENTICITY OF A UNION'S SHOWING OF INTEREST IN SUPPORT OF A PETITION FOR CERTIFICATION IS NOT PER SE UNLAWFUL.

This proposition is implicit in this Court's decision in *NLRB v. California Compress Co.,* supra, 274 F. 2d at 106. In that case this Court was confronted with a situation involving employer interrogation for the purpose of challenging a union's showing of interest and such conduct was not viewed as unlawful by this Court.

The Board's argument that Petitioner has usurped the functions delegated to the Board by Congress cannot be squared with the facts. In addition, the Board's position cannot be defended on principle. In a subsequent decision, the Board has taken virtually the opposite approach in a situation involving a gross and blatant interference with the Board's election processes and administrative procedures. That is the case of *Philanz Oldsmobile Inc.,* 137 NLRB 103, 50 LRRM 1262 (June 26, 1962) where the United Automobile Workers' Union engaged in a strike for the conceded purpose of compelling the employer by economic force and coercion to agree to a consent election instead of proceeding with a hearing scheduled before the Board. The employer discharged the striking employees and was found guilty by the Board of discrimination in violation of Section 8(a)(3) of the Act holding "that the strike was a lawful economic strike and therefore protected." The Board majority stated:

> "In filing a representation petition, the Union sought an election to determine the bargaining representative of Respondent's employees. By

striking, the employees sought to achieve the same result, only sooner. There was therefore no inconsistency between the objectives of the strike and of the representation petition. Rather, the action was in support of the Union and had the effect of strengthening its statute." (50 LRRM at 1263.)

* * * *

"There is nothing in the Board's rules or in the Act which prohibits parties from agreeing to a consent election even where a representation petition has been filed at a Regional Office of the Board. * * * There is simply nothing unlawful or against public policy in employees striking to exert pressure on an employer to agree to a consent election, anymore than it is unlawful for employees to strike for outright recognition or for a collective bargaining contract where no other union has been certified." (50 LRRM at 1263.)

It is respectfully submitted that the foregoing analysis of the Board is totally inconsistent with the position it has taken in the instant case. As pointed out by the dissenting opinion in the *Philanz Oldsmobile* case:

"* * * it is clear that when the employees struck, there had been no undue delay in holding the election, and there is no evidence that Respondent was seeking any unwarranted delay. Under these circumstances, it would in our view * * * have made a mockerey of the Board's consent election procedure to hold the objective protected and, in effect, have taken the word 'consent' out of such procedure." (50 LRRM at 1265.)

Surely, by any realistic appraisal, to coerce an employer to surrender his legal right to a hearing before the Board in a pending representation case is certainly no less an interference with the Board's election processes and administrative procedures than Petitioner's conduct in the instant case as viewed by the Board. Why should Petitioner's conduct be regarded as unlawful and that of the Union in the *Philanz Oldsmobile* case be regarded as lawful when measured by the same yardstick? The Board's approach in these two cases can only be characterized as arbitrary and lacking in that degree of uniformity of standard inherent in the concept of due process of law.

The Board's position in the instant case that petitioner's conduct was at one and the same time violative of the employees' right of privacy and the Board's right to administer its own internal rules without outside influence is mutually inconsistent. On the one hand, the Board seems to be primarily concerned with employees' rights under Section 7 of the Act (which is the subject matter of Section 8 (a) (1) of the Act). On the other hand, the Board's paramount concern seems to be its own administrative procedures. Significantly, both of these points are applicable to the cases involving employer polling of employees by means of a private secret ballot. In those cases,[43] there is a threatened if not actual interference with employees' alleged right of privacy and

[43]See *NLRB v. Crystal Laundry,* supra, and *NLRB v. Roberts Bros.,* supra.

with the Board's election processes and administrative procedures. This is readily apparent. Requiring employees to express their views on union organization or their choice in connection with a particular union can easily be regarded as an invasion of the right of privacy, if any such right indeed exists, even though the inquiry is conducted through a secret ballot. Nothing in Section 7 of the Act requires employees to submit to such conduct or even to communicate their sentiment for or against a union to their employer. Nevertheless, the Board has not taken the position that private polling of employees constitutes a violation of some right of privacy. In fact, the comment of this Court quoted above in *NLRB v. Roberts Bros.*, supra, pretty much dispels any notion of a right of privacy in this context, to-wit:

> "We think it is no longer proper to assume that the American employee is a craven individual afraid to stand up and express himself freely on the subject of his own welfare." (225 F. 2d at 60.)

Moreover, what type of conduct can be imagined as more incompatible with the Board's election processes than a private secret ballot taken by an employer to determine the issue of union representation of his employees? Such conduct goes beyond the Board's administrative procedures. It virtually flies against the Act itself which provides[44] that the Board shall conduct elections to determine questions concerning

[44]Section 9.

union representation. If anything usurps the Board's function in this regard and interferes with the Board's administrative machinery for carrying out the requirements of the Act, it is a private poll conducted by an employer. Surely, this needs no extended argument.

Nevertheless, the Board has not so regarded employer poll taking. The Board's position in the instant case thus represents a departure from precedent and constitutes a new legal philosophy without foundation or justification.

The *per se* approach is constantly being rejected by the Courts in favor of an objective analysis of the facts and issues in each individual case. Perhaps the leading example of a flat repudiation of the Board's attempt to fashion a *per se* rule of law is the series of hiring hall cases of a few years ago. The United States Supreme Court in *Local 357 International Brotherhood of Teamsters, et al. v. NLRB,* 365 U.S. 667, 81 S. Ct. 835, 6 L. Ed. 2d 11, 47 LRRM 2906, held, in effect, that the Board's position that an exclusive hiring hall was unlawful *per se* was erroneous as a matter of law. The Supreme Court stated:

> "Congress has not outlawed the hiring hall. * * * (365 U.S. at 673.)
>
> "There being no express ban of hiring halls in any provision of the Act, those who add one, whether it be the Board or the Courts, engage in a legislative act. * * * (365 U.S. at 674.)
>
> "Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the

> Board cannot go farther and establish a broader, more pervasive regulatory scheme. * * *'' (365 U.S. at 676.)

In *Local 60, United Brotherhood of Carpenters, et al. v. NLRB,* 365 U.S. 651, 81 S. Ct. 875, 6 L. Ed. 2d 1, 47 LRRM 2900, the Supreme Court held erroneous as a matter of law the Board's position that under a concededly unlawful hiring hall agreement a union was required to reimburse employees for union dues and fees which they had paid. The Supreme Court ruled that such remedy was inappropriate in the absence of specific evidence of coercion and specific evidence that the payments were required as a condition of employment. Rejecting the Board's position that coercion could be inferred from the facts of the case, the Supreme Court pointed out that:

> ''The unions in the instant case were not unlawfully created. On the record before us, they have engaged in prohibitive activity. But there is no evidence that any of them coerced a single employee to join the union ranks or to remain as members. All of the employees affected by the present order were union members when employed on the job in question. So far as we know, they may have been members for years on end. No evidence was offered to show that even a single person joined the union with the view of obtaining work on this project. Nor was there any evidence that any who had voluntarily joined the union was kept from resigning for fear of retaliatory measures against him.'' (365 U.S. at 654.)

See also *NLRB v. News Syndicate Co.,* 365 U.S. 695, 81 S. Ct. 849, 6 L. Ed. 2d 29, 47 LRRM 2916, also rejecting the *per se* approach.

This Court has taken the same view in *NLRB v. Associated General Contractors,* 270 Fed. 2d 425, 44 LRRM 2802; *Morrison-Knudsen Co. v. NLRB,* 276 Fed. 2d 63, 45 LRRM 2907; *NLRB v. International Hod Carriers, et al.,* 287 Fed. 2d 605, 47 LRRM 2756.

The vice of the *per se* approach is simply that it substitutes a priori assumptions for facts and evidence. It reaches its result without proof. That is precisely what the Board has done in the instant case. The Board has concluded that petitioner's employees were coerced. But there is no proof and no evidence of coercion. To invent and add a new right to those enumerated in Section 7 of the Act, i.e., a right of "privacy" merely compounds the error. It has no probative value. Likewise, to say that petitioner interfered with the Board's administrative processes does not show that the employees were restrained or coerced. The actual facts are stipulated. There are no facts which show that anyone was coerced with respect to any of the rights contained in Section 7. Because of the Regional Director's action, no election has ever been held. Therefore, no one knows whether the Union would have or could have won an election, whether the Union at any time represented a majority of employees, or whether the employer at any time changed their minds about the Union and, if so, in what way. Petitioner did not prevent the employees

from expressing their choice in a secret ballot election. The Board and the Union prevented it.

An analogy can perhaps be drawn between the instant case and the hiring hall cases referred to above. If petitioner had conducted its interviews with employees without assuring them that their jobs were not endangered, without saying that they had no obligation to discuss the union or to answer any questions, without giving them an option to leave immediately and avoid any interview at all, without refraining from expressing any sentiments for or against union organization, it is quite conceivable, if not likely, that the Board would have taken the position that such conduct was unlawful for the reason that (as in the case of the hiring hall contracts) the employer had failed to provide proper safeguards to protect the employees' rights. In view of the foregoing decisions of this Court and the Supreme Court of the United States, it seems fair to assert that the Board's position would not be sustained. It is respectfully submitted that this Court and the Supreme Court would hold (as in the hiring hall cases) that the failure to provide affirmative safeguards against possible coercive effects does not convert otherwise lawful acts into unlawful ones. *A fortiori,* in the instant case petitioner did in fact take every precaution to avoid any possible interference, restraint or coercion of its employees. The Board's characterization of petitioner's conduct is based upon pure inference and is unfair, unfounded and improper. The General Counsel's

complaint did not charge petitioner with improper conduct. As previously pointed out, the gravamen of the complaint was petitioner's alleged improper motive. The complaint does not allege that the manner in which the interrogation was conducted was unlawful. With respect to the four employees described by the Board as having been induced by petitioner to revoke their union authorizations, the Board's finding and conclusion is also unfair, unfounded and improper. It is not based on the facts. Whatever these employees did, they chose to do voluntarily. The fact that these "purported revocations" (so-called by the Board) were not communicated to the Union in itself shows that there was no coercive intent or effect.

Illustrative of the impropriety of the Board's *per se* approach in the instant case is the following statement in its opinion:

> "The cases are commonplace in which employer knowledge of (employee leaders of organizational campaigns) has been but the first step to retaliatory and discriminatory action against employees for the patent purpose of restraining, interfering with and thwarting their organizational activity; especially is this so during the incipient stages of organizational campaigns." (R 21.)

It is respectfully submitted that the foregoing attitude, typical of the analysis pursued by the Board in this decision, is grossly unfair and improper and is totally inconsistent with the fundamental principles of due process of law. What the Board has done, in effect, is to find petitioner guilty on the basis of what

some other employers have done or might do. On its face, the Board's analysis is contrary to our elementary concepts of justice.

The Board then concludes:

> "Interrogation, conducted for such purpose, serves no useful function and is not conducted for a purpose 'legitimate in nature.'" (R 21.)

Again, this is simply begging the question and substituting unwarranted assumption for facts and evidence.

The Board's attempt to find coercive effects produced by petitioner's conduct, notwithstanding the safeguards taken, is without substance. The only point referred to by the Board in this regard concerns the four so-called revocations. That this amounts to no more than a bootstrap argument is apparent from the Board's language, to-wit:

> "Four of the five employees were *plainly induced* to attempt the revocation of their authorization to the union to represent them." (R 22, Emphasis added.)

For the reasons already presented, the Board's characterization of "plainly induced" has no more merit than the conclusion it purports to sustain.

CONCLUSION

The argument advanced by the Board that an employer may legitimately question a union's majority status but may not legitimately question a union's showing of interest is not supported by any legal authority. Moreover, it is completely inconsistent with the Court cases discussed above.[45] The Board's analysis of the showing of interest rule is erroneous. Although the Board states that its authority to hold an election is not dependent upon any specific showing of interest (R 20), the Board's own rules and regulations, statements of procedure, as well as the petition form itself show that the agency has, in fact, imposed such a requirement. It seems an incredible denial of due process for the Board to hold it unlawful for an employer to challenge a union's compliance with a Board-made rule on the ground that the Board is not bound by that rule. Petitioner in effect is being penalized by the Board for attempting to challenge the union's showing of interest in the proper manner, i.e., utilizing the Board's administrative machinery rather than by litigation in a formal hearing.

Petitioner was not attempting to interfere with the Board's election processes; it was attempting to comply with them.[46]

The Board's distinction between questioning a union's majority status and questioning a union's

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[45]Cf. *NLRB v. California Compress Co.*, supra.

[46]If any interference with the Board's election procedure can be found from the facts of this case, it can only be the false statements of the employees themselves.

showing of interest is without any solid foundation. The process of arithmetic makes it clear that if a union does not represent 30% of the employees, it does not represent a majority. By acknowledging the employer's right to interrogate employees to determine the union's majority status, the Board recognizes that an election is not the only method of resolving a question concerning representation.

The theory upon which the Board seeks to overcome the plain facts and to transcend the existing law is by the concept of "invasion of privacy" and the claimed invulnerability of its own administrative procedures. No explanation is given of how the gap is bridged between interference or alleged interference with the Board's administrative procedures and interference, restraint or coercion of the rights of employees.

No authority is cited by the Board for its contention that the right of privacy is guaranteed by Section 7 of the Act. But even assuming such right exists, the stipulated facts of the case show that no violation occurred. The employees were not compelled to answer any questions. They were expressly advised that petitioner was not inquiring into their feelings for or against the union. They were specifically told that they need not furnish any information at all. In fact, they were told that they were free to leave immediately or at any time. None of the employees made any protest or raised any objections to any statements made or any questions asked. The Board's

finding that four employees (out of some 45) were "plainly induced to attempt a revocation of their authorization to the union to represent them" cannot be squared with the stipulated facts.

No threats were made, no reprisals occurred. It was stipulated that "each employee was assured that his (or her) job was not endangered * * *". Thus the Board's finding and conclusion of interference, restraint and coercion of employees is not based on the evidence, or on any inferences which may properly be drawn from the stipulated facts, but is based purely upon assumption, speculation or principles devoid of legal foundation.

The concept of "invasion of privacy" seems particularly inept under this statute where public rights and not private rights are designed to be protected. Even those administrative procedures which the Board is so concerned about in the instant case explicitly state that the public interest is not served if a union seeking certification does not have at least a 30% showing of interest[47] on the very ground that expenditure of government funds for conducting rep-

[47]The evidence submitted by Petitioner shows on its face by plain arithmetic that the union could not have made a valid showing of interest. The fact that the Regional Office determined that the employees had given false statements does not dispose of the matter. Assuming that the Regional Office compared the signatures on the cards submitted by the union with those on the mimeographed forms submitted by Petitioner, how was the comparison made? Was a handwriting expert used and if not, why not? How did the Regional Office resolve the obviously conflicting evidence? On what basis did the Regional Office decide which employees' statements were false?

resentation elections is not justifiable in such circumtances.[48]

Petitioner also contends that the Union's petition for election should have been dismissed by the Board and objects to the Board's failure and refusal to do so. It does not seem improper to suggest that false statements in connection with a Board proceeding should not be condoned. Admittedly, the employees made false statements in the instant case. Yet, the Board does not explain why such an abuse of the Board's processes should be tolerated. It is respectfully submitted that whichever statement of the employees is false (the one made to the Board, or the one made to the employer), the petition for election should be dismissed together with the complaint in the instant proceeding. False statements by employees made in the context of a representation case before the Board should be held to be a bar to Board certification. False statements, knowingly and deliberately made, should not be treated lightly and cannot be regarded as effectuating the purposes of the Act. Petitioner's acts and conduct were open and above-board. Petitioner accepted the employees' statements in good faith and submitted them to the Regional Office in good faith. The employees' statements were not made in good faith if the Regional Office was correct in branding them false. If the Regional Office was not correct, there is all the more reason for dismissing the petition for certification for failing to submit a valid showing of interest.

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[48]Board's Statement of Procedure, Sec. 101.18(a). The text is set forth in Appendix A.

Finally, it is respectfully submitted that the Board's order cannot be sustained in terms of the allegations of the complaint and the issues litigated.

Wherefore, for all of the foregoing reasons, Petitioner prays that the Board's decision and order be reversed, vacated and set aside and that the Board's petition for enforcement be denied.

Dated, San Francisco, California,
January 28, 1963.

Respectfully submitted,
GEORGE O. BAHRS,
ROBERT J. SCOLNIK,
By ROBERT J. SCOLNIK,
Attorneys for S. H. Kress & Co.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT J. SCOLNIK
Attorney

(Appendix A Follows)

Appendix A

Appendix A

Subpart C—*Representation Cases Under Section 9(c) of the Act.*

SEC. 101.17. *Initiation of representation case.*—The investigation of the question as to whether a union represents a majority of an appropriate grouping of employees is initiated by the filing of a petition by any person or labor organization acting on behalf of a substantial number of employees or by an employer when one or more individuals or labor organizations present to him a claim to be recognized as the exclusive bargaining representative. If there is a certified or currently recognized representative, any employee, or group of employees, or any individual or labor organization acting in their behalf may also file decertification proceedings to test the question of whether the certified or recognized agent is still the representative of the employees. The petition must be in writing and signed, and either must be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. It is filed with the regional director for the region in which the proposed or actual bargaining unit exists. Petition forms, which are supplied by the regional office upon request, provide, among other things, for a description of the contemplated or existing appropriate bargaining unit, the approximate number of employees involved, and the names of all labor organizations which claim to represent the em-

ployees. If a petition is filed by a labor organization or in the case of a petition to decertify a certified or recognized bargaining agent, the petitioner must supply, within 48 hours after filing but in no event later than the last day on which the petition might timely be filed, evidence of representation. Such evidence is usually in the for mof cards authorizing the labor organization to represent the employees or authorizing the petitioner to file a decertification proceeding.

SEC. 101.18. *Investigation of petition.*—(a) Upon receipt of the petition in the regional office, it is docketed and assigned to a member of the staff, usually a field examiner, for investigation. He conducts an investigation to ascertain (1) whether the employer's operations affect commerce within the meaning of the act, (2) the appropriateness of the unit of employees for the purposes of collective bargaining and the existence of a bona fide question concerning representation within the meaning of the act, (3) whether the election would effectuate the policies of the act and reflect the free choice of employees in the appropriate unit, and (4) whether, if the petitioner is a labor organization seeking recognition, there is a sufficient probability, based on the evidence of representation of the petitioner, that the employees have selected it to represent them. The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of spe-

cial factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees. However, in the case of a petition by an employer, no proof of representation on the part of the labor organization claiming a majority is required and the regional director proceeds with the case if other factors require it unless the labor organization withdraws its claim to majority representation. The field examiner, or other member of the staff, attempts to ascertain from all interested parties whether or not the grouping or unit of employees described in the petition constitutes an appropriate bargaining unit.

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that no question of representation exists within the meaning of the statute, because, among other possible reasons, the unit is not appropriate, or a written contract precludes further investigation at that time, or where the petitioner is a labor organization or a person seeking decertification and the showing of representation among the employees is insufficient to warrant an election under the 30-percent principle stated in paragraph (a) of this section.

(c) For the same or similar reasons the regional director may request the petitioner to withdraw its petition. If, despite the regional director's recommendations, the petitioner refuses to withdraw the petition, the regional director then dismisses the petition stating the grounds for his dismissal and informing the petitioner of his right of appeal to the Board

in Washington, D.C. The petitioner may within 10 days appeal from the regional director's dismissal by filing such request with the Board in Washington, D.C. After a full review of the file with the assistance of its staff, the Board may sustain the dismissal, stating the grounds of its affirmance, or may direct the regional director to take further action.